89-1911

No. (1)

Supreme Court, U.S.
FILED
MAY 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1989

ROBERT C. BELL, JR.

Petitioner

vs.

JOHN P. LYDEN, M.D.

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

ROBERT C. BELL, Jr.
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QUESTIONS PRESENTED

1. In the middle of a general housing shortage should the development plans of a managing partner, age 77, who is 75% owner of 400 buildable acres (plus 100± building lots) be stalled by a sole minority partner, age 50, who is waiting for the older man to die?

2. When an offer has been withdrawn, can an arbitrator subsequently require it to be continuing?

3. Can an arbitrator ignore a 30 year long-standing agreement for fair and reasonable compensation to the managing partner from 20% of the profits of an investor.

4. Must the consummation of a transaction between partners await an unnecessary approval of a Zoning Board which has already taken nearly two years to act.

TABLE OF CONTENTS

PAGE

Question Presented i

Table of Contents. ii

Table of Authorities iii

Opinions and Judgments Below 1

Jurisdictional Grounds 2

Constitutional Provisions. 2

Statement of the Case. 2

Reasons for Granting Writ of Certiorari. .10

Conclusion 15

Certificate of Service 16

Appendix

TABLE OF AUTHORITIES

PAGE

Berenson v. Town of Newcastle (1975), 38 N.Y.2d 102,341 N.E.2d 236. 22

Corpus Juris Secundum - Arbitration, Sections 161-162. 15

Robert E. Kurzis, Inc. v. Incorporated Village of Upper Brookville (1979), 67 A.D.2d 70, 414 N.Y.S.2d 573. 4

Ochia v. Estate of Sarria (1983), 97 A.D.2d 538, 468 N.Y.S.2d 44 (See Appendix) 19a

Stanley v. Gannon (1919), 180 N.Y.S. 603, 606 22

No.

IN THE

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OCTOBER TERM, 1989

ROBERT C. BELL, JR., Petitioner

vs.

JOHN P. LYDEN, M.D., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The "Arbitration Award" in this case, requiring Petitioner Bell to sell 72± acres of his 400± acres of land exclusively to his lone minority partner, John P. Lyden, violates

the "due process" rights to which Appellent Bell is entitled. The award should be cancelled and the parties left "as they were."

OPINIONS AND JUDGMENTS BELOW

A motion for leave to appeal to the New York Court of Appeals was denied without opinion on February 20, 1990. (See page 6a)

A motion to enlarge time to perfect an appeal was denied without opinion and appeal dismissed by the Appellate Dividion on November 16, 1989. (see page 2a)

A judgment confirming an arbitration award to the plaintiff John Lyden was signed by Justice Matthew F. Coppola on September 28, 1988 without a hearing which had been requested. (see page 3a)

JURISDICTIONAL GROUNDS

Jurisdiction is invoked for Petitioner Bell's due process rights under the Fifth

and Fourteenth Amendments to the Constitution of the United States, including a failure to examine the laws and the facts of the case and neglect to progress the execution of the award and vacating the award under Section 7511 of the New York Statutes.

CONSTITUTIONAL PROVISIONS, FEDERAL AND STATE STATUTES

This case involves the 5th and 14th amendments to the United States Constitution; The New York statutory powers of an arbitrator; glaring misinterpretations of agreements and basic laws. (See Appendix.)

STATEMENT OF THE CASE

There is a severe shortage of moderate and low-cost housing. Newspapers describe it almost daily. And it will get worse. This case represents a golden opportunity to ameliorate this problem.

Much of the difficulty revolves around the feeling and desire of most communities and neighborhoods to remain "essentially the same." The general inclination is to "keep outsiders out."

This community feeling of "self-protection" and "exclusivity" has been translated into action. Thirty percent (30%) or more of building and development costs accrue today before shovels break the ground. Some are good and some are not, but many are excessive. Central supervision over such is impossible, but there should be a ceiling and some control over "zoning" and "planning."

New York City is surrounded by municipalities which want to keep the towns just the way they are. If there are changes to be made, insiders are much preferred over outsiders. In New York State, power to change municipal authority is lodged solely in the

Legislature. The Governor's office in Albany advises that he has no such authority.

Almost exactly five years ago, petitioner Bell filed in this honorable Supreme Court a "Petition for Writ of Mandamus" (No. 84-1709). Such is essentially a criminal process writ. There were few, if any, precedents. There was no judicial record to support that petition, but the problem at which it was directed still remains.

Page 2 of that earlier Petition states the problem as follows:

"PETITION"

> "1. The people of the United States face a severe and almost unprecedented housing shortage.
>
> "2. Said housing shortage bears most heavily on young married couples with children, or desiring such.
>
> "3. These families, or landowners, or land developers wishing to serve them, are often thwarted by some townspeople and some town offi-

cials allied with them who want to "keep the town just the way it is."

"4. Metropolitan areas, particularly New York City, are hemmed in by communities of this kind who subject any development to unconscionable delays and extravagant planning expense, which is often more than thirty (30%) percent of the cost of the project, if such is permitted at all.

"5. The consequence of such delays and expense has been an unprecedented increase in the cost of homes and a national shortage of housing.

"6. These dilatory and obstructive communities have no authority in the housing field other than that delegated to them by the legislatures of their respective states.

"7. Said authority is constitutionally limited to the conventional use of "police power," which is circumscribed by matters of "health" or "morals" or "safety."

"8. This Petition is directed solely at "Density Zoning" and not the necessary administrative delays coincidental to the construction and approval of dwellings, roads, water supply, septics systems, etc.

"9. The New York Court of Appeals has already held zoning in excess

of five-acres to be unconstitutional. (Robert E. Kurzis, Inc., v. Incorporated Village of Upper Brookville, 67 S.D. 2d 70, 414 NYS 2d 573 (1979))."

Page 1 of that earlier Petition suggests a solution:

"QUESTIONS PRESENTED"

"1. Should "Density Zoning" exceed one acre per house if such is certified to be a buildable area by a qualified civil engineer?

"2. Should the time which a municipal planning agency takes to consider an application for a subdivision be unlimited?"

"PETITION FOR WRIT OF MANDAMUS"

"TO THE JUSTICES OF THIS HONORABLE COURT:"

"PROPOSED ORDER TO SHOW CAUSE"

"The Town of Lewisboro, County of Westchester, State of New York, is ordered and directed to show cause within a period of sixty days as to why the following appended order should not be issued."

"ORDER"

> "The Town of Lewisboro, County of Westchester and State of New York, is ordered and directed to repeal orders and limitations which prevent the construction of a dwelling house on one acre or more of land where such is found practicable by a certified civil engineer and to hear and decide applications for subdivision with sixty days."

* * * *

Petitioner Bell believes that he has been one of the largest landholders in Westchester County, New York for thirty years, with about 400 acres, plus about one hundred lots and five houses and a couple of barns in his name. This property which is now generally idle should be put to use and promptly.

This matter has now progressed through the New York Courts of Appeals in Albany and is ready for the attention of this United States Supreme Court with the necessary record.

Bell has a young minority partner, John Pierpont Lyden, M.D., who does not want to

partition, sell or build on or subdivide the property. He would like to await the death of Bell, who is in good health but seventy-seven (77) years of age, and thereafter buy the property (400± acres) at a sacrifice close-out price.

Dr. Lyden has about a twenty-five (25%) percent partnership interest in most of the property. Bell does most of the maintenance work himself because Dr. Lyden has objected, in writing, to costs of such. Bell must give weekly attention to repairs, records, bills, rent collection, public and tenant relations, etc. Such is a bit of a strain on his physical and financial resources. Taxes have escalated dramatically and the rental from the old structures on the property pay only a fraction of the taxes plus maintenance.

The Town of Lewisboro planners and zoners in 1979 approved the construction of three hundred and twenty-four (324) housing

units on about one-half of the property. This was only after the presentation of nine (9) subdivision plans and the expenditure of over $300,000 by Petitioner Bell and others. Six artesian wells were drilled and much road work done. Efforts were directed toward a lake and to a golf resort, which once graced the property. But the syndicate broke up over the slow progress, questionable good faith of regulations and regulators, etc. Bell, as managing partner, and John M. Lyden, father of John P. Lyden, M.D., respondent herein, then carried on as best they might. John M. Lyden retired as Vice Chairman of Ted Bates Advertising Co. and passed away several years ago. He previously had transferred his partnership interest, with Bell's approval, to his son, Dr. John Pierpont Lyden, the party respondent to this matter.

Managing partner Bell believed that he had a good developer in Raymon Rezai (nee

Hassan Rezaeizadek Firouzabadi), a graduate of the University of Teheran with two degrees from the University of Pennsylvania in land planning and architecture and numerous connections and affiliated with a great New York architectural firm. Bell received an incomplete draft contract on August 6, 1987, which was tendered with an uncertified check for $160,000 from the potential buyer. (This check turned out to be a bad check.) Dr. Lyden had previously tentatively, orally approved the terms of the proposed agreement, which still required much revision. This draft agreement, covered only about seventy-two (72) acres of unimproved land at the intersection of Highways 35 and #123, which was zoned 2 acres. The disposition of this 72 acres is now the sole issue in this case. The buyer proposed $160,000 on contract signing; $840,000 cash (total $1,000,000), plus a $650,000 first mortgage payable within three

years, plus various conditions, benefits and considerations. This was on a printed form draft agreement. Bell indicated only his general individual limited concurrence (see paragraph 40 only). Closing was to be within 90 days. Buyer professed a desire and interest in continuing his activity on the balance of the 300+ acres to the rear of the proposed subdivision if something could be done to delimit the four- acre zoning on the neighboring parcels. This rear area, at one time, when "zoning" was first introduced (May 30, 1936) and, for many years thereafter, was one-quarter (1/4) acre zoning sixteen (16) times smaller than the present four-acre zoning).

Of course, Dr. Lyden took the proposed contract to his attorney. And circumstances changed drastically. They chose to treat the matter as a final and binding agreement and, ultimately, urged Dr. Lyden to person-

ally and exclusively claim the 72± acres involved in this case. Tentative questions and comments in further investigation alarmed the Teheran expatriate (Mr. Rezai) and he delivered a written notice on August 26, 1987, withdrawing any offer for the Lewisboro property. Petitioner Bell personally delivered such to the office of Mr. Cherneff, attorney for Dr. Lyden, on August 26, 1987. He did not personally see Mr. Cherneff. Five days later, Bell received a letter dated August 25, 1987, but obviously written and mailed later, from Mr. Cherneff that Dr. Lyden "intended" to exercise his "right of first refusal" for the property.

An "intention" to buy is not a firm agreement to buy. An agent to buy real estate must hold authority to do so in writing and Mr. Cherneff did not even claim to have such. Even if he did, such was never exercised. Mr. Cherneff later claimed to have set up a clos-

ing for some date in November 1987, but such never occurred. An arbitration was requested by Mr. Cherneff on December 11, 1987. But this request was only after two other far better offers for the entire property had been received. Copies of the same had been immediately forwarded to Lyden and his lawyer, Cherneff.

John A. Humbach, the assigned arbitrator, turned out to be a former law school professor of Richard Davis and, according to an item in The New York Times, a staunch opponent of development. Mr. Davis was the attorney and law partner of Mr. Cherneff, who handled the matter for Messrs. Lyden and Cherneff. Bell had visualized the meeting as basically an effort at conciliation with few, if any, basic differences between the parties. Lyden's previous offers to buy Bell out had been truly ridiculous and obviously preposterous and were not "good faith" pro-

posals. Dr. Lyden's letters were on May 31, 1984 for $500,000; also January 9, 1986 ($600,000) and February 13, 1986 ($600,000). Lyden expressly stated that such "does not depend upon any planning or zoning clearances" [letter of May 1, 1984].

Dr. Lyden is not a necessitous man. The hearings disclosed that he estimates his net worth to be in excess of six million ($6,000,000) dollars and that of his wife, the daughter of Mrs. Happy Murphy Rockefeller, to be in excess of seven million ($7,000,000) dollars.

Dr. Lyden has not, and could not, rightly claim to take over the deal that was proposed by the Iranian (Mr. Rezai).

REASONS FOR GRANTING THE WRIT

1. Mr. Rezai withdrew his offer of August 6, 1987 prior to any claim of "acceptance in writing" by attorney Cherneff. Cherneff's

Cherneff's letter "dated" August 25, 1987 was not delivered until August 31, 1987. Dr. Lyden's ultimate letter of acceptance was dated October 21, 1987.

2. Prior to Dr. Lyden's letter of acceptance on October 21, 1987, two proposals, one in excess of thirty (30) typed pages, came on August 27, and October 13, 1987 from parties offering ten million, five hundred thousand ($10,500,000) dollars for all the Lewisboro property of the parties. These opened a new area of negotiation, which effectively shelved the Rezai negotiation. Copies were sent immediately to Lyden and Cherneff. Such doubtless inspired them, on December 11, 1987, to demand the present arbitration hearing. In and of themselves, these new offers should be regarded as supplanting the "Rezai" offer.

3. An arbitrator is obligated to follow the law and the facts of a case and use con-

stitutional due process. The two basic partnership agreements, of one page each, (see attached copies) have prevailed since 1960 and 1964. The attached map shows the strategic location of the property in dispute. Opposing counsel may have abandoned this proceeding, or at least Bell presently so believes. Please note that the Arbitration Award requires (paragraph 6) that "the closing of title is to be within a reasonable time and a diligently pursued application." Neither has happened since the award of August 2, 1988. This will soon be two years ago. Records of the Lewisboro Planning Board record only a preliminary inquiry.

4. There is, and unquestionably has been, partiality within the meaning of the statute (C.P.L.R. Sec. 7511ii) on the part of the arbitrator. The Arbitrator is, and has been, a professor at Pace University Law School. Robert F. Davis, Esquire, was one

of his pupils. Such was revealed in advance of the hearing, but the Respondent did not choose to challenge solely on this ground. However, in the course of the hearing, particularly when it was revealed that the offer of Mr. Ramon Rezai (nee Firouzabadi) was specious and without any supporting funds whatsoever, the arbitrator, himself, stopped the hearing and struck from the record any reference to the deficient character of the revoked, so-called "offer," which was used as a basis for awarding the 70± acres in question to Petitioner Lyden.

5. None of the previous Lyden offers were conditioned on local government approval. One of Lyden's letters specifically negates his desire or need for such (see copy attached). A prejudiced arbitrator cannot now require such. The arbitration award should be vacated and the parties returned to their status quo ante.

6. None of Lyden's proposals to Bell were contingent on the approval of the Lewisboro Planning and Zoning authorities. The Arbitrator requires that the Town of Lewisboro formally approve this partial transfer for a partial partnership interest. Little if anything has been done to promote or progress or to do this.

7. Bell has continued to personally pay his full taxes on the property, which Lyden claims in toto.

8. Lyden has done nothing about offering to pay or paying the 20 percent of profit benefit to which Bell is entitled. Bell has now worked for thirty (30) years to maintain and improve the property.

9. Lyden has no legal or equitable right or easement such as the Arbitrator has awarded over Bell's neighboring 92 acres of individually owned and recently acquired property on the West.

10. The needs of the partnership for funds to keep it going and the needs of the area for housing are more urgent than they were when Bell was trying to raise money several years ago. Lyden should not be permitted to further defeat and delay the business purposes of this partnership. The parties should remain as they were. The "Resai" deal should be regarded as the nullity it is and was.

Heretofore, Respondent Lyden's best offer for all of Bell's interest in their jointly held property had been $600,000. The best buildable parcel of 72 acres of the jointly held Bell-Lyden properties was awarded by a partial arbitrator, John A. Humbach, to Respondent Lyden for $160,000 down and a deferred later payment of about one million dollars. This $160,000 is now held by Lyden counsel not by any agreement or approval of Bell. This payment would be contingent and due merely upon the approval by the Town of Lewisboro

of the boundary line between the seventy-two (72) acres, which were handed to Respondent Lyden by Arbitrator Humbach. Such has already taken several years. Thus, the housing shortage persists and Petitioner Bell finds himself headed for bankruptcy, thanks to a combination of Respondent Lyden and his legal counsel and Arbitrator Humbach and an inactive Planning Board in the Town of Lewisboro.

Of course, there are innumerable cases and texts on the subject of what is a valid offer and acceptance, but the Arbitrator ignores such. Likewise, he asserts in Finding #4 that "time of closing is not of the essence," although the draft contract of August 6, 1987 specifically says, "Closing will be within 90 (ninety) days after signing the contract."

Also, Finding #6 states:

> 6. As time of closing is not of the essence, the closing of title is to be within a reasonable time, including an adequate time to apply for and receive, upon a diligently pursued application, the subdivision approval referred to in the next paragraph."

Findings #7 and #8 establish obligations which Lyden and/or his agents have not met:

> 7. In the event that the application for subdivision approval to permit a legal conveyance of the "PREMISES" is not made by September 15, 1988, or that such application is made and not diligently pursued by Lyden or is denied and such denial becomes final, then (1) the escrowed monies paid by Lyden on account of the Bell/Lyden Contract shall be returned to Lyden from escrow, and (2) the Bell/Lyden Contract shall be terminated without prejudice to the rights, if any, that either party may have against the other for a breach thereof."

> 8. Bell and Lyden shall each have an obligation of good faith and fair dealing in all matters relating to the completion of this sale, including the exercise of best efforts to obtain the subdivision approval referred to in the preceding paragraph."

Obviously the time to terminate this charade is now.

Mr. Mitchell Berenson, the appellant in Berenson v. Town of New Castle, 38 N.Y.2d 102, 378 N.Y.S.2d, 341 N.E.2d 236, who was once a guest in Bell's home, advised that it took him thirteen (13) years to surmount legal obstacles and achieve his plans for a subdivision.

A frequently mentioned New York case which cites many other New York cases is Stanley v. Gannon (1919) 180 NYS 603, 606. It states:

> "It is a well-established rule that, in order to create a contract, the minds of the parties must exactly meet in reference to every substantial term of the proposed contract. There must be a clear and unequivocal acceptance of a definite and certain offer, without material qualification or variation. An acceptance incorporating a term, condition, or reservation not embraced within the terms of the offer is equivalent to a rejection."

CJS 422-429 discusses this subject under "Arbitration," Section 161-162, citing numerous cases. This is not a matter in which an arbitrator has casually gone astray. It is a case where a 72-hour "right of first refusal" in 1960 was stretched to "thirty days" in 1964 and has erroneously been allowed to command a nullifying position in this case for nearly three years. Timely appeals have kept it alive. Now is the time to break the housing deadlock which land owners, builders and homeseekers have faced for too long.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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New Canaan, CT 06840
(203) 966-2308

PETER J. KIERNAN
Berger & Steingut
600 Madison Avenue
New York, NY 10022
(202) 965-0560

Attorneys

CERTIFICATE OF SERVICE

Petitioners hereby certify that they have, this ___ day of May, 1990, forwarded 40 copies of this Petition to the United States Supreme Court by placing copies of same into a properly addressed parcel to:

Clerk of the Supreme Court
of the United States
Supreme Court Building
1 First Street, N.E.
Washington, D.C. 20543

and three copies to counsel for Petitioner, to wit:

Robert F. Davis, Esq.
55 Smith Avenue
Mt. Kisco, New York 20549
(914) 666-5600

by depositing same in the United States Mail, first class, this _____ day of May, 1990.

ROBERT C. BELL, Jr.

PETER J. KIERNAN

APPENDIX

TABLE OF CONTENTS

	PAGE
Letter dated May 31, 1984 from Dr. John Lyden to Robert Bell, Jr.	1a
Decision and Order on Motion by the Supreme Court of the State of New York, Appellate Division: Second Department, dated November 16, 1989.	2a
Confirmation of Arbitration Award by the Supreme Court of the State of New York, County of Westchester, dated September 28, 1988.	3a
Section 7511. Vacating or modifying award by the New York Statutes	4a
Decision of the State of New York Court of Appeals denying Appeal, dated February 20, 1990.	6a
Award of Arbitration of the American Arbitration Association, dated August 2, 1998.	7a

Appendix - continued:

	Page
Map of Disputed 72± Acres in Westchester County, State of New York and Surrounding Partnership and Other Property.	14a
Map of Many Houses in Surrounding Area. None on Subject Area.	15a
Arial View Map	16a
Agreement between Petitioner and Respondent, dated November 15, 1960.	17a
Supplemental Agreement between Petitionerand Respondent.	18a
Hernan Ochoa, et al., Appellants, v. Estate of Alberto Sarria, et al., Respondents.	21a
"Exclusionary Zoning and the Small Developer," The New York Times, July 28, 1987.	24a
Figure Depicting Method of Construction of a Building (Petitioner's patent).	26a

John P. Lyden, M.D.
The Hospital for Special Surgery
535 East 70th Street
New York, New York 10021

—

(212) 606-1126

May 31, 1984

Dear Bob,

I am writing to you in response to your letter of May 22nd. I hereby offer to purchase your interest (including your partnership interest) in our purchases (less what has been sold off to date) the Woodpike, Roemer, and Lake Kitchawan properties for $500,000 subject to a discussion and agreement as to terms of payment. This offer is not conditional, i.e., it does not depend upon any planning or zoning clearances. [Emphasis supplied.]

I look forward to hearing from you.

Sincerely,

[Signed John]

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

0409W
B/nl

ISAAC RUBIN, J.P.
ARTHUR D. SPATT
STANLEY HARWOOD
ALBERT M. ROSENBLATT, JJ.

Motion No. 9018

John P. Lyden, respondent,

v Robert C. Bell, Jr., appellant.

DECISION & ORDER
ON MOTION

Motion by appellant to enlarge time to perfect an appeal from a judgment of the Supreme Court, Westchester County, entered September 29, 1988.

Upon the papers filed in support of the motion and the papers filed in opposition or in relation thereto, it is

ORDERED that the motion is denied; and it is further,

ORDERED that on the court's own motion, the appeal is dismissed RUBIN, J.P., SPATT, HARWOOD and ROSENBLATT, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

November 16, 1989

LYDEN V BELL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

JOHN P. LYDEN, M.D.,

Plaintiff,

- against - Index No. 10871/88
Motion Date

ROBERT C. BELL, JR.,

Defendants.

COPPOLA, J.

Petitioner moves to confirm an arbitration award. Respondent cross-moves to vacate the award.

Respondent's cross-moving papers take issue with the factual findings of the arbitrators and the legal conclusions found to flow therefrom. There is no showing that the arbitrators exceeded their jurisdiction or went beyond the boundaries of the dispute as submitted to them. Consequently the motion to confirm is granted and the cross-motion to vacate is denied.

The judgment has been signed.

Dated: White Plains, NY
September 28, 1988

MATTHEW F. COPPOLA
Justice of the Supreme Court

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NEW YORK STATUTES

Section 7511. Vacating or modifying award

(a) When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

EMPHASIS ADDED-

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:

(i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or

(ii) a valid agreement to arbitrate was not made; or

(iii) the agreement to arbitrate had not been complied with; or

(iv) the arbitrated cliam was barred by limitation under subdivision (b) of section 7502.

(c) **Grounds for modifying.** The court shall modify the award if:

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submited; or

3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

(d) **Rehearing.** Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court.

(e) **Confirmation.** Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.

State of New York,
Court of Appeals

At a session of the Court, held
at Court of Appeals Hall in the
City of Albany on the
twentieth day of
Febraury A.D. 1990

Present, HON. SOL WACHTLER, Chief Judge, presiding.

2-11 Mo. No. 9

John P. Lyden,

Respondent,

v.

Robert C. Bell, Jr.,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Donald M. Sheraw
Clerk of the Court

American Arbitration Association

CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL

In the Matter of the Arbitration betwwen

JOHN P. LYDEN, M.D.
-AND-
ROBERT C. BELL, JR.

CASE NUMBER: 19 115 0383 87

AWARD OF ARBITRATOR(S)

I, (WE), THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated November 15, 1960 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD as follows:

1. A contract (the "Bell/Lyden Contract") was entered into between Bell and Lyden as a result of a written offer by Bell, viz, the "thirty day notice" of right of first refusal, followed by a written acceptance on behalf of Lyden.
2. The terms and conditions of the Bell/Lyden Contract are the terms and conditions contained in the form of

contract (including rider), dated August 6, 1987, styled as an agreement between Lewisboro Associates Company, as "SELLER," and Hassan Rezaeizadeh Firouzabadi, and "PURCHASER," and signed by Bell and Firouzabai (the "Firouzabadi Contract"), except that:

(a) the "SELLER" is Bell and/or Lewisboro Associates Company of their respective interests as such interests may appear,

(b) the "PURCHASER" is Lyden,

(c) paragraph 490 to the Firouzabadi Contract, apart from the first sentence thereof, is not a part of the Bell/Lyden Contract,

(d) the balance of the purchase price to be paid at the closing by check and by a purchase money first mortgage and note may, at Lyden's option, be reduced by the amount that Lyden is entitled to receive out of the proceeds of sale, such reductions to be applied to both the check and the note so as to reduce each by the same percentage amount.

(e) the provisions (including the arbitration requirement of paragraph 4 thereof) of the agreement

dated November 15, 1960, between John M. Lyden and Bell, as amended and assigned, continue to apply and, except as inconsistent with the provisions of the Firouzabadi Contrat, they apply to the sale under the Bell/Lyden Contract according to their tenor.

3. No subdivision approval has been received from the proper authorities as is required to permit the "PREMISES" described in the Firouzabadi Contract to be legally conveyed separately from the remainder of the tax lot of which they are a part (includes separation of the two lots provided for by paragraph 36 of the Firouzabadi Contract). Neither signatory to the Firouzabadi Contract intended that there be an illegal conveyance of the "PREMISES," and the parties' respective obligations to close are interpreted to be conditional upon receipt of such subdivision approval. The provisions of paragraph 31 of the Firouzabadi Contract apply.

4. Time of closing is not of the essence. ← WRONG

5. Bell shall perform and cooperate in the performance of each and all of seller's obligations to convey sole title to Lyden as required under the Bell/Lyden Contract; provided, however, that seller's obligations shall be discharged unless, or on before August 31, 1988, Lyden delivers a check in the amount of $160,000, and meeting the requirements of paragraph 3.b. of the Firouzabadi Contract, to Morgan P. Ames, Esq. or a substitute attorney-at-law for Bell, designed by Bell in writing, at such attorney's office (in Stamford, Connecticut in the case of Mr. Ames). On delivery, the amount of said check shall be held by said attorney in an escrow account pursuant to paragraph 26 of the Firouzabadi Contract. Time periods which are to be measured from the signing of the contract under the Firouzabadi contract shall be measured from the date of the delivery of said check.

6. As time of closing is not of the essence, the closing of title is to be within a reasonable time, including an adequate time to apply for and receive, upon a diligently pursued application, the subdivision approval referred to in the next paragraph.

7. In the event that the application for subdivision approval to permit a legal conveyance of the "PREMISES" is not made by September 15, 1988, or that such application is made and not diligently pursued by Lyden or is denied and such denial becomes final, then (1) the escrowed monies paid by Lyden on account of the Bell/Lyden Contract shall be returned to Lyden from escrow, and (2) the Bell/Lyden Contract shall be terminated without prejudice to the rights, if any, that either party may have against the other for a breach thereof.

8. Bell and Lyden shall each have an obligation of good faith and fair dealing in all matters related to the completion of this sale, including the exercise of best efforts to obtain the subdivision approval referred to in the preceding paragraph.

9. The provisions of the following paragraphs of the Firouzabadi Contract, as incorporated into the Bell/Lyden Contract, survive (without limitation to others which may also survive) the closing of title, viz.: 30, 31, 32, 33, 34, 35, 37, and 39.

10. The administrative fees and expenses of the American Arbitration Association totaling FOUR THOUSAND ONE HUNDRED DOLLARS ($4,100.00) shall be borne one-third by Lyden and two-thirds by Bell. Therefore, Bell shall pay to Lyden the sum of TWO THOUSAND SIX HUNDRED THIRTY-THREE DOLLARS AND THIRTY-FOUR CENTS ($2633.34). The arbitrator's compensation totaling ONE THOUSAND TWO HUNDRED DOLLARS ($1200.00) shall be borne one-third by Lyden and two-thirds by Bell. Therefore, Bell shall pay to Lyden the sum of TWO HUNDRED DOLLARS ($200.00) and Bell shall pay to the American Arbitration Association the sum of ONE HUNDRED DOLLARS ($100.00) still due the Association.

This award is in full settlement of all claims submitted to this arbitration.

8/2/88

John A. Humbach, Arbitrator

STATE OF NEW YORK :
: ss.:

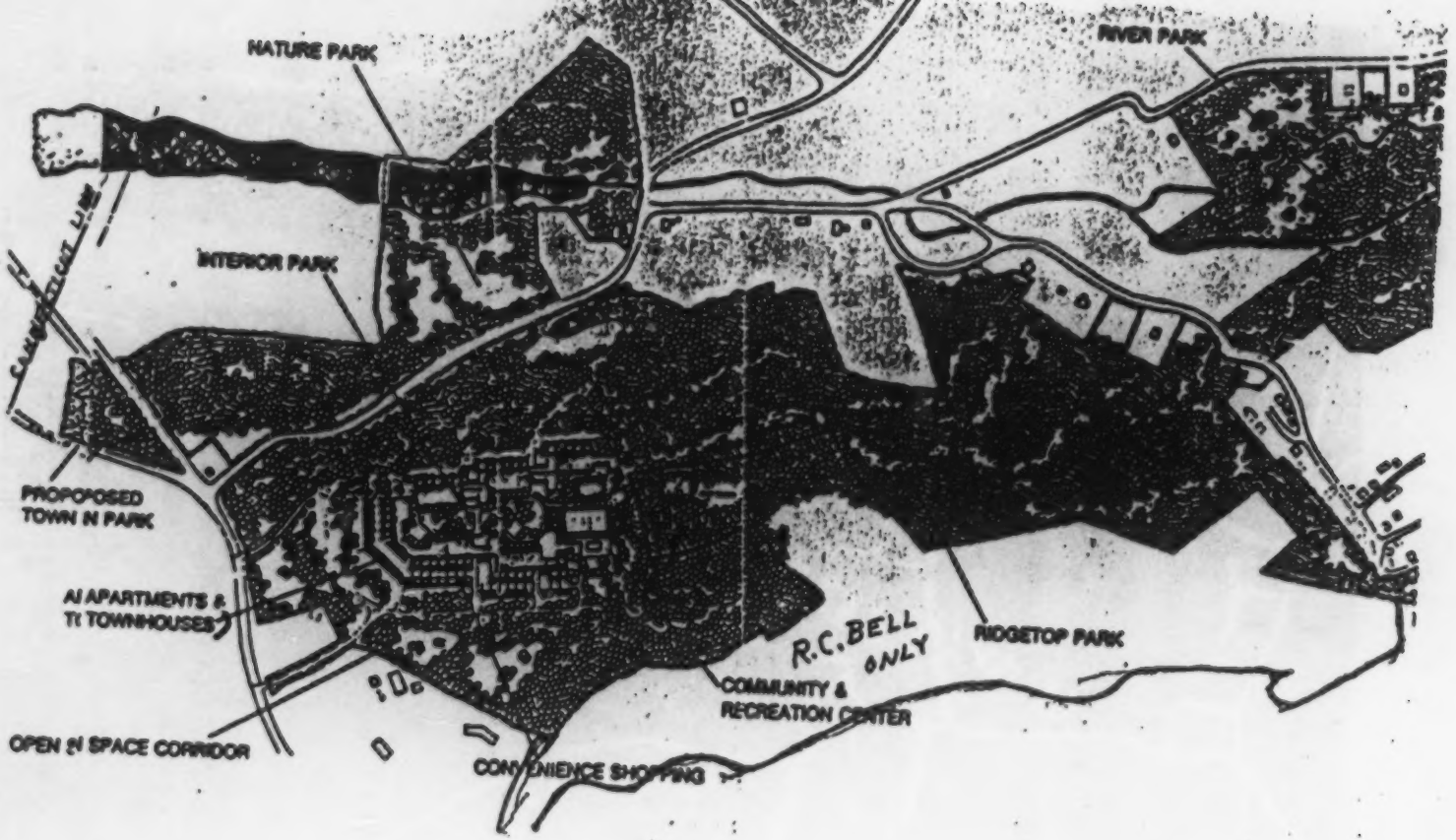
COUNTY OF WESTCHESTER:

I, John A. Humbach, do hereby affirm upon my oath as Arbitrator that I am the individual described in an[d] who execued this instrument, which is my award.

8/2/88

John A. Humbach, Arbitrator

CONNECTICUT LINE
72± ACRES
WET


NATURE PARK
RIVER PARK
INTERIOR PARK
PROPOPOSED
TOWN N PARK
AI APARTMENTS &
TI TOWNHOUSES
OPEN N SPACE CORRIDOR
R.C. BELL
ONLY
COMMUNITY &
RECREATION CENTER
RIDGETOP PARK
CONVENIENCE SHOPPING

BELL VALLEY
BELL MEADOW
MAIN
123

Agreement entered into as of this 15th day of November, 1960 between John M. Lyden and Robert C. Bell, Jr., both of New Canaan, Connecticut.

Witnesseth:

Whereas the parties desire to acquire, hold and sell the properties of the Woodpike Realty Corp. and Lake Kitchawan Estates Inc. in the Town of Lewisboro, Westchester County, New York, for their mutual profit and to establish a working relationship for the handling of the same,

Now therefore in consideration of the promises of the parties, it is agreed as follows:

1. The said Woodpike and Kitchawan properties shall be held jointly by the parties as partners under the name of Lewisboro Associates Company. Bell shall contribute two-thirds of the cost and expense of the Woodpike property and one-half of the cost and expense of the Kitchawan property with Lyden contributing the balance. Proceeds shall reimburse investment including advances for expenses on the same basis. Profits shall be shared in proportion to the investment except that Bell shall receive in addition 20% of the share of profit accruing to IGNORED

Lyden (for example, if Lyden's share of profit is $10,000, Bell shall receive $2,000 out of said share.)

2. The parties shall be partners under the laws of New York only within the scope of the venture properties and Bell shall be the managing partner. Both parties shall have full access to all pertinent records and reasonable accountings. Either party may sell all or any part of the property at any time and from time to time but shall first offer it to the other party on the same terms and conditions and accord the other party 72 hours to accept or reject the same, offers and acceptances or rejections to be in writing and signed.

3. Bell may divide his interest with O. R. Gilbert, of Garrison, New York, or other suitable party or parties agreeable to Lyden.

4. Disputes between the parties which are not settled by mutual agreement shall be resolved by arbitration under the rules of the American Arbitration Association.

[signed]
John M. Lyden

[signed]
Robert C. Bell, Jr.

SUPPLEMENTAL AGREEMENT

The Agreement of November 15, 1960 between the undersigned parties is hereby confirmed with the following modifications and additions:

1. The Roemer property shall be shared on the same basis as the Lake Kitchawan Estates, Inc. property.

2. Bell's right to share in Lyden's profit, if any, in return for services shall terminate on the death of Bell, at which time Lyden's profit shall be computed using estate tax valuations as of date of death, as to unsold property, and Bell's estate shall receive from Lyden or from a liquidation of partnership property as Lyden shall elect, sufficient to meet the same, an amount equal to 20% of Lyden's share of profit as thus computed.

3. Lyden shall become the managing director on the death of Bell and the partnership shall continue to the end of the calendar year in which the death of either party shall occur and from year to year thereafter unless sooner terminated by any party in interest on written notice sixty days before the end of any calendar year.

4. The right to sell any and all the partnership property shall extend to the heirs, successors and assigns of the parties and all the aforesaid persons shall have the right of first refusal which shall be extended to thirty (30) days, offers and acceptances to be in writing, sent by certified or registered mail; in case of acceptance of the offer, closing of title and delivery of the deed or deeds, as the case may be, shall take place within thirty (30) days after such acceptance, at a place designated in such acceptance. Should such offeree party fail to accept such offer of sale, then such offeree party agrees to join in any sale by the offeror to others.

[signed]
John M. Lyden

Dated 8/3/1964

[signed]
Robert C. Bell, Jr.

Hernan OCHOA, et al., Appellants,

97 A.D.2d 538; N.Y.S.2d 44

ESTATE OF Alberto SARRIA, et

al., Respondents

Supreme Court, Appellate Division,
Second Department.

Oct. 31, 1983.

Lessees brought action for specific performance of option to purchase leased premises owned by lessors. The Supreme Court, Special Term, Queens County, Kunzeman, J., granted lessors' motion to dismiss and denied lessee's cross motion for summary judgment granting specific performance. Lessees appealed. The Supreme Court, Appellate Division, held that: (1) purported exercise, by attorney for lessees, of option contained in lease to purchase leased premises was ineffective, absent written authorization by lessees empowering attorney to exercise the option, and (2) lessors' silence after receiving letters purporting to exercise option did not cause any harm to or mislead lessees, there being no risk that lessees would forfeit their leasehold interest and, therefore, equitable estoppel would not be applied against lessors.

Order affirmed.

* * * * *

[1,2] In order for an agent to exercise an option relating to real property, that agent must have written authorization from his principal or principals granting him such power (General Obligations Law, Section 5-703, subd. 1). Therefore, a purported exercise, by the attorney for the lessee, of an option contained in a lease to purchase the leased premises is ineffective absent written authorization by the lessee empowering his attorney to exercise the option (see Sands Textile Finishers, Inc. v. Gross, NYLJ, March 5, 1980, p.15, col. 5; Three Star Offset Printing, Inc. v. Daniels, NYLJ, Jan. 23, 1980, p. 13, col. 1; see, also, Hoaglund v. Daniels, 50 A.D.2d 923, 377 N.Y.S. 2d 618; Lancaster At Fresh Meadow v. Suderov, 6 Misc.2d 12, 162 N.Y.S.2d 162, affd. 5 A.D.2d 1015, 174 N.Y.S.2d 882; 747 Southern Blvd. Realty Corp. v. Wein-Rose, 201 Misc. 552, 106 N.Y.S.2d 139; Matter of Lendon Realty Corp. [Weber], 193 Misc. 120, 83 N.Y.S.2d 660). Since, in the case at bar, plaintiffs' attorney had no written authori-

zation from plaintiffs to exercise the option, the purported exercise of the option was insufficient and ineffective.

THE NEW YORK TIMES

TUESDAY, JULY 28, 1987

Exclusionary Zoning and the Small Developer

To the Editor:

For more than 25 years I have held about 400 acres of land, plus approximately 100 lots, plus some houses in Lewisboro, N.Y., not far from my home. In 1936 and for many years thereafter most of it was zoned at a quarter of an acre. More recently, most of it was upzoned to 2 acres, and within the last couple of months to 4 acres (16 times as much).

Also, if you subdivide, a "subdivision fee" of $5,000 is now imposed for each lot they give you. Limitations multiply for "wetlands," "slopes," "trees," "hilltops," "hillsides," "green acres." More than $300,000 has been spent in development costs. Administrative delays have been interminable. I have been informed that "they" want to keep the town "just the way it is."

Of course, New York City is surrounded by towns with this viewpoint. Small developers have little pull and

have been almost put out of business. About 30 percent of costs now accrue before shovels ever hit the dirt. Consequently, the housing shortage is incredible. People must drive many miles to work, and the traffic situation gets worse and worse. I have a long list of companies that are moving elsewhere, and costs to everyone will be considerable.

A good house, a good well, a good septic field can easily be put on a half-acre of land. What excuse is there for four-acre or even two-acre mandatory zoning? Some towns with adequate water and sewage permit 60 families to an acre. The "police power" (including "zoning power") of government is constitutionally and judicially limited to matters of health, morals or safety (read the cases). "Density zoning," like "exclusionary zoning," is unwarranted and illegal.

ROBERT C. BELL, JR.

New Canaan, Conn., July 2, 1987

April 2, 1974 R. C. BELL, JR 3,801,685
METHOD OP CONSTRUCTING A BUILDING
Filed Oct. 28, 1971

FIG. 1

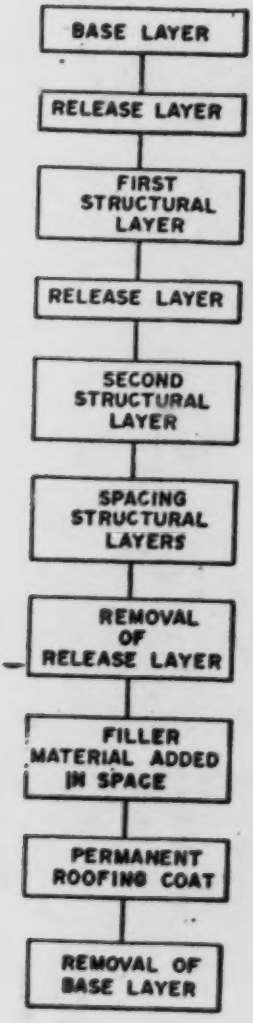


FIG. 2

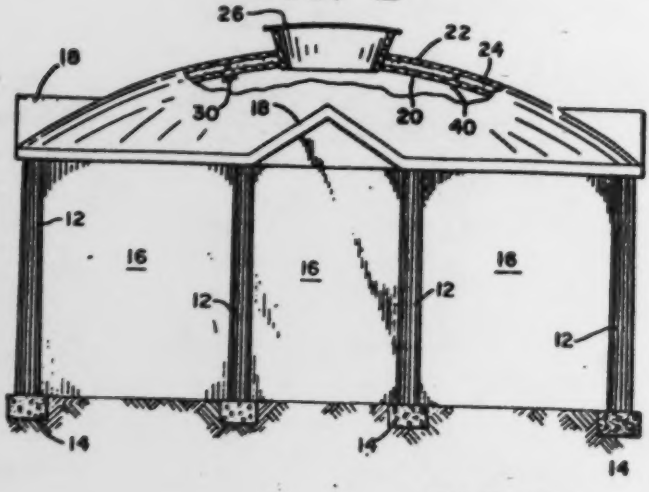


FIG. 3

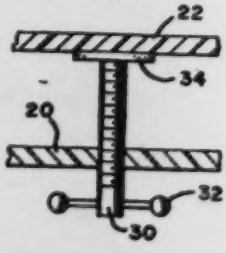


FIG. 4

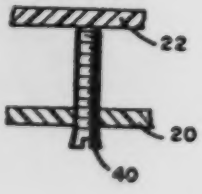
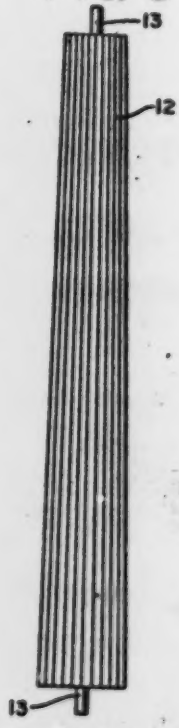


FIG. 5



Supreme Court, U.S.
FILED
JUL 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1911

In the

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT C. BELL, JR.,

Petitioner,

v.

JOHN P. LYDEN, M.D.,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

JAMES G. SWEENEY
(Counsel of Record)
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GERALDINE N. LEWIS

SHAMBERG MARWELL CHERNEFF
HOCHERMAN & DAVIS, P.C.
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Mount Kisco, New York 10549
(914) 666-5600

Attorneys for Respondent
John P. Lyden, M.D.

July 12, 1990

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Respondent maintains that the underlying proceeding does not present any issues for resolution by this Court. However, in the event this Court decides to grant the Petition, the only question presented to this Court is as follows:

> Should the award of the Arbitrator, granting Respondent specific performance for the purchase of real property under a contract, resulting from Respondent's timely exercise of his right of first refusal under a Partnership Agreement between Petitioner and Respondent, be annulled when Petitioner was afforded a full and fair opportunity to present evidence at the arbitration hearing, Petitioner has exhausted his state appellate rights without success, and there is no evidence of fraud, corruption, misconduct, partiality or arbitrariness on the part of Arbitrator?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW . . .	i
TABLE OF AUTHORITIES	iv
OPINIONS AND JUDGMENTS BELOW	1
JURISDICTIONAL STATEMENT	3
CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED	4
FACTUAL STATEMENT OF THE CASE . . .	5
SUMMARY OF ARGUMENT	9
REASONS FOR DENYING THE WRIT	12
POINT I: NONE OF THE CONSIDERATIONS GOVERNING THIS COURT'S REVIEW OF A PETITION FOR WRIT OF CERTIORARI ARE PRESENT HERE AND, THEREFORE, THE PETITION MUST BE DENIED	12
POINT II: EVEN IF THIS COURT WERE TO GRANT THE WRIT OF CERTIORARI, THE ARBITRATOR'S DECISION WOULD HAVE TO BE AFFIRMED AS THE DECISION IS SUPPORTED BY THE RECORD . .	21

POINT III: THIS PETITION IS FRIVOLOUS AND THE COURT SHOULD AWARD RESPONDENT DAMAGES AND DOUBLE COSTS 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES	PAGE
Clark v. Florida, 475 U.S. 1134 (1986)	27
Haggerty v. Keller, 474 U.S. 968 (1985)	28
J.P. Stevens & Co., Inc. v. Rytex Corp., 34 N.Y.2d 123, 356 N.Y.S.2d 278 (1974)	25
Maross Construction Inc. v. Central New York Regional Transportation Authority, 66 N.Y.2d 341, 497 N.Y.S.2d 321 (1985)	23
Mount St. Mary's Hospital v. Catherwood, 26 N.Y.2d 500, 311 N.Y.S.2d 863 (1970)	22
Park Avenue Investment & Development, Inc. v. Barkheimer, 471 U.S. 1108 (1985)	27
Security and Law Enforcement Employees, Dist. Council 82 v. Albany County, 116 Misc. 2d 766, 455 N.Y.S.2d 1004 (1982), aff'd, 96 A.D.2d 976, 466 N.Y.S.2d 841 (3d Dep't 1983), aff'd, 61 N.Y.2d 965, 475 N.Y.S.2d 280 (1984)	23

Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 473 N.Y.S.2d 774 (1984) 24, 25

Wilkens v. Allen, 169 N.Y. 494, 62 N.E. 575 (1902) 23

STATUTES

N.Y. Civ. Prac. Law & Rules § 7511 (McKinney 1980) 4, 5, 17

N.Y. Gen. Bus. Law § 198-a (McKinney 1988 & Supp. 1990) . . . 22

OTHER

Rules of the Supreme Court of the United States Rule 10 (1990) passim

Rules of the Supreme Court of the United States Rule 14.5 (1990) 20

Rules of the Supreme Court of the United States Rule 42.2 (1990) 27, 29

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ROBERT C. BELL, JR.,

Petitioner,

v.

JOHN P. LYDEN, M.D.,

Respondent.

OPINIONS AND JUDGMENTS BELOW

An arbitration award, granting Respondent specific performance against Petitioner and directing Petitioner to convey certain real property of approximately 300 acres in the Town of Lewisboro, Westchester County, New York, to Respondent pursuant to an agreement between Petitioner and Respondent, was issued by Arbitrator John A. Humbach on

August 2, 1988 (the "Arbitration Award"). See Petitioner's Brief at 7a.

On August 16, 1988, the Arbitrator rendered a "Disposition of Modification" which corrected a minor computational error in the award of administrative expenses but otherwise affirmed the Arbitration Award.

A judgment confirming the Arbitration Award and denying Petitioner's motion to vacate the award was rendered by the Honorable Matthew F. Coppola, Justice of the Supreme Court, Westchester County, and entered in the Office of the Westchester County Clerk on September 28, 1988. See Petitioner's Brief at 3a.

On September 11, 1989, the Supreme Court, Appellate Division, Second Department, granted Petitioner's motion to enlarge the time to perfect his appeal taken on October 28, 1988, and to serve

and file his Brief and the Record on Appeal, until October 11, 1989. However, on November 16, 1989, the Appellate Division, Second Department denied Petitioner's second request for an enlargement of the time to perfect his appeal and dismissed the appeal sua sponte. See Petitioner's Brief at 2a.

On February 20, 1990, the Court of Appeals denied Petitioner's motion for leave to appeal from the Appellate Division's dismissal of the appeal. See Petitioner's Brief at 6a.

JURISDICTIONAL STATEMENT

There is no basis for this Court to assume jurisdiction of this case. This was an action for specific performance of an agreement between the Petitioner, Robert C. Bell, Jr., Esq., and the Respondent, John Lyden, M.D., two business partners. Contrary to Petitioner's

contention, the arbitration proceeding and award do not involve any constitutional issues. See Petitioner's Brief at 9. Further, no federal cases, questions of federal law or issues with nationwide importance are involved in the dispute between the parties. Petitioner is simply using the certiorari procedure to relitigate the merits of the arbitration proceeding. These circumstances do not confer upon this Court jurisdiction to review the underlying decision.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Contrary to Petitioner's representation, the only statute having any bearing on Petitioner's rights and the issues herein is Section 7511 of the New York Civil Practice Law and Rules (McKinney 1980), which is reproduced in the Appendix to Petitioner's Brief at 4a-

5a. CPLR § 7511 provides that an arbitrator's award can be vacated or modified only in the limited circumstances where there was corruption, fraud or misconduct involved in obtaining the award, the arbitrator was partial, or the arbitrator exceeded his authority.

FACTUAL STATEMENT OF THE CASE

In 1964, Respondent's father, John M. Lyden ("John Lyden"), formed a partnership with Petitioner for the purpose of acquiring, holding and selling real property. The Partnership, known as "Lewisboro Associates Company," acquired two parcels of land in the Town of Lewisboro of approximately 300 acres (the "Partnership property"). This property was contiguous to approximately 100 acres of property owned by Petitioner individually.

The Partnership Agreement between John Lyden and Petitioner authorized either partner to sell any portion of the Partnership property providing the "selling partner" offered the property to the "non-selling" partner first, on the same terms and conditions of any offer made by the selling partner to a third party. Under the Partnership Agreement, the right of first refusal had to be exercised within 30 days of the notice of the third-party offer to the non-selling partner.[1]

---

[1] The Partnership Agreement between Petitioner and John Lyden (Respondent's father) was entered on November 4, 1960 and thereafter amended on August 3, 1964. One of the material provisions of the amended Agreement provided that each partner would have 30 days (as compared to 72 hours under the 1960 Partnership Agreement) within which to exercise his right of first refusal. On December 16, 1979, Respondent's father and Petitioner entered into an agreement entitled "Bill of Sale and Assignment" whereby Respondent's father assigned to Respondent his interest in the Partnership Agreement. Petitioner consented to the assignment.

On August 6, 1987, Petitioner entered into a Contract with Raymon Rezai (now Hassan Rezaeizadeh Firouzabadi) for the sale of approximately 75 acres of the Partnership property ("Rezai Contract") which was contingent upon Respondent's waiver of his right of first refusal. On August 8, 1987, Petitioner sent Respondent a copy of the Rezai Contract as required by the Partnership Agreement.

At Respondent's direction, on August 24, 1987, Respondent's counsel, Peter R. Cherneff, Esq. (a member of Shamberg Marwell Cherneff Hocherman & Davis, P.C.), telephoned Petitioner and advised him that Respondent had decided to exercise his right of first refusal and purchase the 75 acres. Mr. Cherneff confirmed this fact in a certified letter to Petitioner dated August 25, 1987. Respondent also personally advised Petitioner of his

decision to purchase the Partnership property on August 24, 1987.

Thereafter, and still within the 30 day period of the option, Respondent advised Petitioner on at least four additional occasions (personally and through Mr. Cherneff) that he wanted to purchase the property.

Petitioner refused to consummate the transaction in accordance with the provisions of the Partnership Agreement. In December 1987, Respondent filed a Request for Arbitration with the American Arbitration Association seeking an order compelling Petitioner to comply with his obligations under the Partnership Agreement and to convey to Respondent his right, title and interest in the 75 acres.

The Arbitration proceeding was conducted in four sessions before Arbitrator John Humbach, Esq. Both

Petitioner and Respondent were represented by counsel and presented evidence during the hearing. On August 8, 1988, Arbitrator Humbach issued an award which, in essence, directed Petitioner to convey title to the 75 acres to Respondent, subject to certain conditions.

Petitioner unsuccessfully challenged the Arbitrator's Award in a proceeding commenced in the Supreme Court, Westchester County, and on appeal to the Supreme Court, Appellate Division, Second Department and the Court of Appeals.[2]

SUMMARY OF ARGUMENT

This is not an appropriate case for this Court to grant a writ of certiorari as the case possesses none of the features that ordinarily must be present in cases

---

[2] The procedural history of the proceeding is set forth in the section entitled "Opinions and Judgments Below" at page 1, supra.

for which such writs are granted. Specifically, the underlying arbitration decision does not conflict with the decision of any federal court of appeals or state court of last resort. Nor does the case involve any questions of federal statutory or constitutional law or so far depart from the "accepted and usual course of judicial proceedings" as to warrant this Court's exercise of its supervisory powers. The fact is that this case involves only the enforcement of the provisions of a Partnership Agreement and a Contract of Sale related to certain real estate located in the Town of Lewisboro in Westchester County, New York.

A review of the Petition reveals that Petitioner seeks only to relitigate the merits of the underlying proceeding and to renew this Court's consideration of certain unrelated exclusionary zoning

issues raised in a "Petition for Writ of Mandamus" filed by Petitioner with this Court over five years ago.

Petitioner had a full and fair opportunity to present evidence at the arbitration proceeding and, in fact, did so. He has exhausted his appellate rights and has failed to have the award set aside. Petitioner should not be permitted to invoke this Court's jurisdiction to review the merits of a case decided almost two years ago.

In addition, Respondent should be awarded damages and double costs against Petitioner. The Petition is clearly frivolous. No one reviewing the matter in light of the considerations for a writ of certiorari set forth in Rule 10 of the Rules of the Supreme Court of the United

States,[3] could have reasonably concluded that the record supports this Petition. Tellingly, Petitioner himself fails to address how this case fits into the considerations set forth in Supreme Court Rule 10. Accordingly, Petitioner should be responsible for Respondent's fees and expenses in opposing this frivolous Petition.

REASONS FOR DENYING THE WRIT

POINT I

NONE OF THE CONSIDERATIONS GOVERNING THIS COURT'S REVIEW OF A PETITION FOR WRIT OF CERTIORARI ARE PRESENT HERE AND, THEREFORE, THE PETITION MUST BE DENIED

This Court has precisely defined the considerations governing its review on

---

[3] All references in this Brief to the Rules of the Supreme Court of the United States will be designated "Supreme Court Rule ____."

writ of certiorari in Supreme Court Rule 10, as follows:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

None of these considerations is present here.

Clearly, the decision at issue was not rendered by a federal court of appeals or a state court of last resort. This case was decided by an arbitrator acting pursuant to the authority established by the New York State Legislature. In accordance with Article 75 of the CPLR, the decision was confirmed by the Supreme Court, Westchester County. Petitioner's appeal to the Supreme Court, Appellate Division, Second Department, from the decision confirming the award, was dismissed sua sponte for failure to prosecute and the New York Court of Appeals refused to grant Petitioner permission to appeal. The decision does not conflict with the decision of any federal court of appeals or state court of last resort.

Additionally, no federal question is at issue. The Partnership Agreement provides that "[t]he parties shall be partners under the laws of New York only." See Petitioner's Brief at 18a. By contracting to have their relationship and rights defined exclusively by the laws of New York, the parties eliminated the possibility that a question of federal law would be raised in a dispute arising from the Agreement.

The Demand for Arbitration (the "Demand") filed by Respondent described this private contract dispute as follows:

> Pursuant to the agreement between the parties . . . Claimant properly exercised his option to purchase certain premises in accordance with the right of first refusal pursuant to a certain Contract of Sale. Robert C. Bell, Jr., Esq. has refused to perform his obligations under said Contract or to convey the land to Claimant that is the subject thereof.

The relief sought was stated as follows:

> An order of the arbitrator compelling Robert C. Bell, Jr., Esq. to comply with the obligations of the Partnership Agreement and to take all steps and acts necessary to convey all right, title and interest in the subject premises to the Claimant.

Clearly, no federal question or constitutional issue is framed by the Demand.

Moreover, the actions of a state entity are not in question. Therefore, no constitutional violation could be at issue.

A review of Arbitrator Humbach's decision (Petitioner's Brief at 7a) confirms that no federal statutory or constitutional law issues were disposed of in this action.

The validity and enforceability of an arbitration award are regulated by State law. The New York State Legislature has

enacted a comprehensive scheme of legislation (Article 75 of the CPLR) defining the procedures governing arbitration proceedings, the enforceability of arbitration awards and the narrow circumstances under which such awards can be reviewed on appeal. Consequently, there is a comprehensive line of case law under Article 75. On appeal, this Court would have to judge the validity of the award according to the well established standards under New York Law.

This is not a proper case for this Court's review for the additional reason that the Arbitrator did not deviate from the ordinary course of judicial proceedings. The undisputed fact is that both parties had an adequate opportunity to and did present evidence to the arbitrator and to cross-examine witnesses

during the hearing. The Arbitrator's decision, which was confirmed by the Supreme Court, Westchester County, reflects that the Arbitrator gave due consideration to all of the evidence and issued findings supported by the record.

Finally, no important question of federal law was considered during the arbitration. Arbitrator Humbach simply determined the parties' rights under the private real estate Partnership Agreement. Tellingly, the New York Court of Appeals determined that the case did not even present issues of state-wide significance so as to warrant that Court's review.

Petitioner's argument that the arbitration proceeding is of national significance because it involves issues of exclusionary zoning and unconstitutional municipal approval processes is disingenuous and must be rejected. See

Petitioner's Brief at 3-4. The constitutionality of the zoning policies and procedures of the Town of Lewisboro was not even a marginal issue in the underlying proceeding. As the caption confirms, no municipal body of the Town of Lewisboro was a party to this proceeding. Further, the Town's zoning laws have no bearing on the parties' contractual rights and, consequently, cannot be treated as a justiciable issue for this Court.

It is readily apparent that Petitioner is using the certiorari procedures to renew this Court's review of the same issues he previously raised before this Court five years ago in his "Petition for Writ of Mandamus" (No. 84-1709) which this Court apparently did not grant. According to Petitioner, he previously presented to this Court the issues of whether Lewisboro's zoning law

requiring a minimum of one acre for every single-family residence was legal and whether municipal bodies should be required to process development applications within a certain period of time. See Petitioner's Brief at 7. This case involves no facts relating to Lewisboro's zoning laws and Petitioner's attempt to resurrect such issues must be rejected.

Supreme Court Rule 14.5 provides:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition. (Emphasis added).

Petitioner's Brief is unintelligible and convoluted and, as the foregoing illustrates, relies on factual misstatements and extraneous arguments. Not once does Petitioner address the

considerations governing the Court's review of the writ or how his constitutional rights were abrogated.

Moreover, the procedural history of the case cannot be gleaned from Petitioner's recitation of the "Judgment and Opinions Below" and "Statement of the Case." Such sections are incomplete, at best.

Petitioner's arguments have not been presented to this Court with any semblance of "accuracy, brevity, and clearness." For this additional reason, the Petition should be denied.

POINT II

EVEN IF THIS COURT WERE TO GRANT THE WRIT OF CERTIORARI, THE ARBITRATOR'S DECISION WOULD HAVE TO BE AFFIRMED AS THE DECISION IS SUPPORTED BY THE RECORD

It is evident that Petitioner's primary objective is to relitigate the merits of the underlying proceeding.

However, in the absence of a more compelling reason, mere dissatisfaction with the result of the action does not qualify this case as one for which a writ of certiorari should be granted.

Notwithstanding, if this Court granted the writ, the governing precedent would require an affirmance of the Arbitration Award. Under New York law, courts possess very limited and narrow powers of review of arbitration awards, particularly when the arbitration was voluntary, as was the case here.[4] The

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[4] A voluntary arbitration is one in which the parties agree, by contract or otherwise, to submit any dispute to arbitration. See generally Mount St. Mary's Hospital v. Catherwood, 26 N.Y.2d 500, 34 N.Y.S.2d 863 (1970). A compulsory arbitration proceeding is one in which the Respondent must participate if the Petitioner commences the arbitration. See, e.g., New York Gen. Bus. Law § 198-a (McKinney 1988 & Supp. 1990). (Section 198-a, known as the "New Car Lemon Law," requires that a manufacturer participate in an arbitration requested by a consumer

Appellate Court cannot review and modify an arbitration award for errors of fact or law (Security and Law Enforcement Employees, Dist. Council 82 v. Albany County, 116 Misc. 2d 766, 455 N.Y.S.2d 1004, 1005 (1982), aff'd, 96 A.D.2d 976, 466 N.Y.S.2d 841 (3d Dep't 1983), aff'd, 61 N.Y.2d 965, 475 N.Y.S.2d 280 (1984)), or disregard for the plain or apparent meaning of the words of an agreement (Maross Construction Inc. v. Central New York Regional Transportation Authority, 66 N.Y.2d 341, 345, 497 N.Y.S.2d 321 (1985)). Essentially, a court may not conduct a de novo review of the merits of the proceeding. Wilkens v. Allen, 169 N.Y. 494, 498, 62 N.E. 575 (1902).

The breadtn of an Arbitrator's authority and the concomitant deference

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alleging a Lemon Law type claim.).

given to his decision is explained in the decision of the Court of Appeals in Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 473 N.Y.S.2d 774 (1984).

> He [the arbitrator] may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement, even though the award exceeds the remedy requested by the parties.

Id., 61 N.Y.2d at 308 (citations omitted).

Relying on the standards set forth in CPLR § 7511, the Court of Appeals further explained:

> The only basis upon which an award can be vacated at the behest of a party who participated in the arbitration or was served with notice of intention to arbitrate is that the rights of that party were prejudiced by corruption, fraud or misconduct in procuring the award, partiality of an arbitrator, that the arbitrator exceeded his power or failed to make a final and definite award, or a procedural failure that was

> not waived (CPLR 7511, subd. [b], par. 1).

Silverman, 61 N.Y.2d at 307 (emphasis added).

Petitioner does not argue that there was any corruption, fraud or misconduct here. Instead, he belatedly claims only that the Arbitrator was partial because he was a first year law professor of Respondent's counsel, Robert Davis, Esq., over ten years earlier.

Notably, this is the first time that Petitioner has ever raised the impartiality of the arbitrator as a grounds for vacating the Arbitration Award. The law is clear that a party who proceeds with an arbitration hearing when he believes the arbitrator may be partial, waives his right to object to the award on the ground of partiality. J.P. Stevens &

Co., Inc. v. Rytex Corp., 34 N.Y.2d 123, 129, 356 N.Y.S.2d 278 (1974).

Prior to the commencement of the hearing, Mr. Davis disclosed to Petitioner that he had been one of several hundred students in Arbitrator Humbach's Real Property class and that he had no other relationship with the Arbitrator. Petitioner admits that he was so advised and never objected to Arbitrator Humbach. See Petitioner's Brief at 17. Thus, Petitioner's argument, raised for the first time here, must be rejected.

It should be noted that the Arbitration Award has been upheld on appeal. See page 1, supra. As Petitioner has offered no evidence that the arbitrator's decision should be set aside, the Petition should be denied.

POINT III

THIS PETITION IS FRIVOLOUS AND THE COURT SHOULD AWARD RESPONDENT DAMAGES AND DOUBLE COSTS

Supreme Court Rule 42.2 states that:

> When a petition for a writ of certiorari . . . is frivolous, the Court may award the respondent . . . just damages and single or double costs.

This Court has awarded a respondent fees and costs under Rule 42.2 in cases where (i) the petitioner showed disregard for judicial procedures including by filing untimely and inappropriate motions (Clark v. Florida, 475 U.S. 1134 (1986)); (ii) the arguments offered in support of the writ of certiorari involved matters of state law, the certiorari procedure was used as a device to delay the resolution of the matter and the alleged constitutional violations were raised for the first time in the petition (Park Avenue Investment & Development, Inc. v.

Barkheimer, 471 U.S. 1108 (1985)); and (iii) no good faith effort was made in the petition to demonstrate why the underlying decision should be reversed (Haggerty v. Keller, 474 U.S. 968 (1985)).

As the foregoing discussion demonstrates, similar circumstances are present here. Petitioner has repeatedly neglected to follow judicial procedures in this case, having failed to perfect his appeal to the Appellate Division, Second Department within a timely fashion. Moreover, the federal statutory and constitutional issues he poses herein are being raised for the first time. Further, this case involves issues of state law only. Petitioner has had a full and fair opportunity to litigate his rights and has availed himself of his appellate rights, although without success. Once again, he

has failed to demonstrate why the Arbitration Award is invalid.

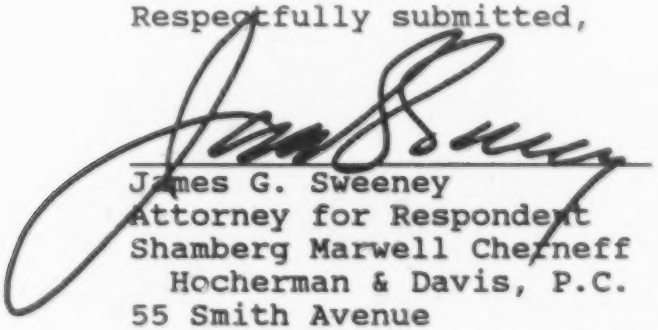
If ever there was a frivolous Petition, this is it. Respondent respectfully requests that, in addition to denying the Petition, the Court award him damages and double costs against Petitioner in accordance with Supreme Court Rule 42.2.

CONCLUSION

For all of the foregoing reasons, Respondent maintains that the granting of the Petition under the circumstances of this case would be an inappropriate use of this Court's judicial resources and an improper exercise of its jurisdiction, and would work an injustice on Respondent. Respondent requests that the Court deny the Petition and award him damages, including reasonable attorney's fees, and double costs.

DATED: July 12, 1990
Mount Kisco, New York

Respectfully submitted,



James G. Sweeney
Attorney for Respondent
Shamberg Marwell Cherneff
Hocherman & Davis, P.C.
55 Smith Avenue
Mount Kisco, New York 10549
(914) 666-5600

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Jacqueline Simone , being duly sworn, deposes and says he is over the age of 18 years and is not a party in this action; that on the 16th day of July, 1990, the deponent served three copies of the annexed Brief in Opposition in the following manner:

By mailing the same in a sealed envelope with postage prepaid thereon, in a post-office of the United States Postal Service within the Sate of New York, located at 99 Church Street, New York, New York, addressed to the last known address of the addressee as indicated below:

TO: Peter J. Kiernan, Esq.
Attorney for Petitioner
Robert C. Bell, Jr.
Berger & Steingut
600 Madison Avenue
New York, New York 10022

Jacqueline Simon

Sworn to before me this
16th day of July, 1990.

James F. Coonan
Notary Public

JAMES F. COONAN
NOTARY PUBLIC, State of NY
Residing in New York County
My Commission Expires July 25, 1990
Registration No. 4938738

No. 89-1911 (3)

Supreme Court, U.S.
FILED
AUG 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1989

ROBERT C. BELL, JR.

Petitioner,

v.

JOHN P. LYDEN, M.D.,

Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Attorneys

No. 89-1911

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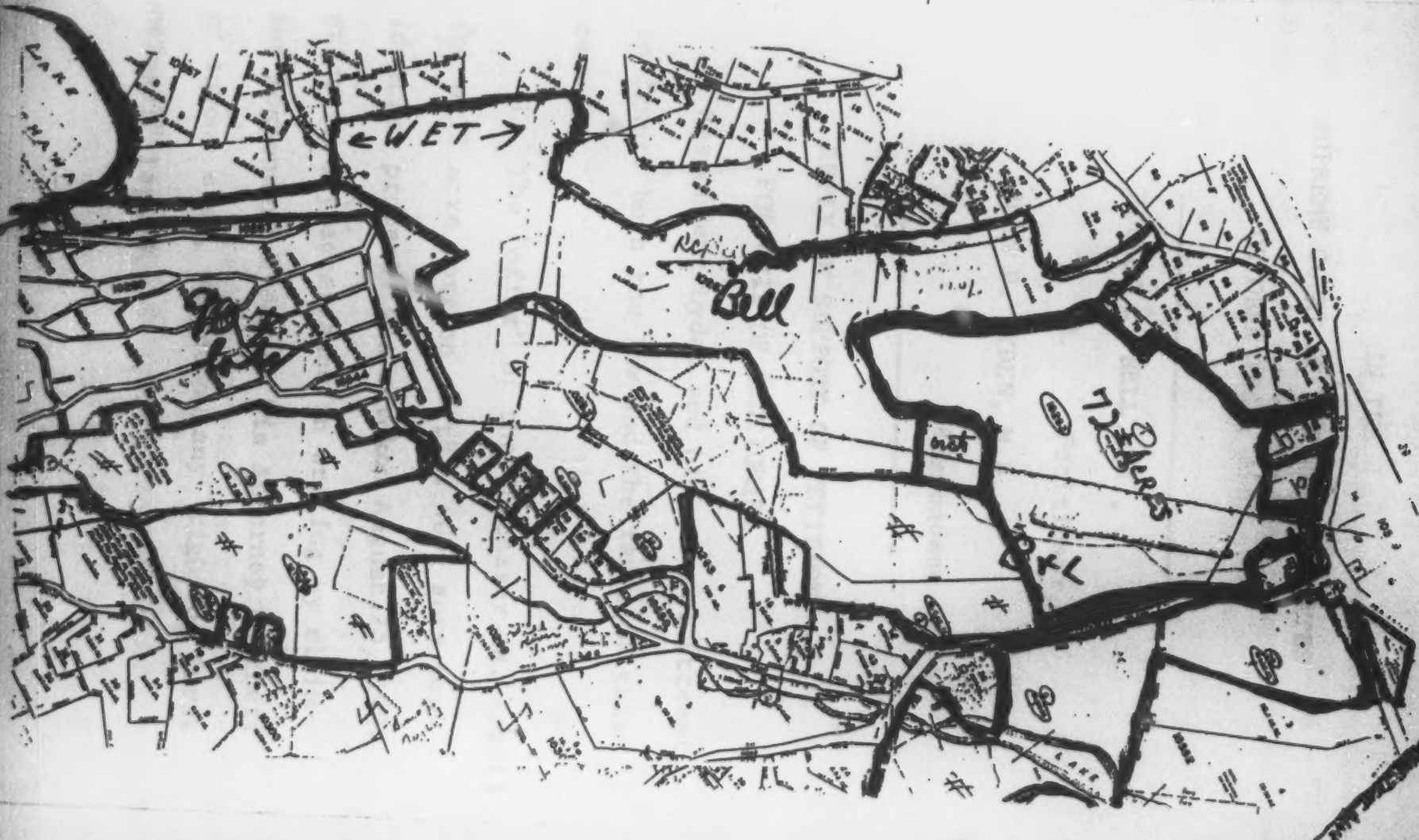
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Bell

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ROBERT C. BELL, JR.,

v. Petitioner,

JOHN P. LYDEN, M.D.,

Respondent

REPLY IN SUPPORT OF PETITION

FOR WRIT OF CERTIORARI

Respondent Lyden and his counsel attempt to ignore both the law and the facts of this case:

1. The "offer" of the Purchaser (R. Rezai) for a 72 acre portion of this 400+ acre residential property was revoked August 25, 1987 prior to any acceptance in writing by claimant Respondent Lyden or his Attorney Cherneff or anyone else, whereupon any "right of first refusal" lapsed.

2. The tardy letter received August 31,1987 from Attorney Cherneff, who had no written authority from anyone, merely advised that Respondent Lyden "intended" to exercise his "right of first refusal".

3. Respondent Lyden tardily attempted to exercise his claimed thirty (30) day right of refusal more than 76 days later. He asked to close 90 days after the initial offer, which had long been revoked.

4. "Time of closing" was of the essence. An arbitrator cannot arbitrarily extend such, and certainly not for a period of several years as Arbitrator Humbach has done here by making the transaction dependent upon Town approvalabout which nothing has apparently been done.

5. Respondent Lyden and his attorney began this attempt to claim Lyden's ownership of this access area to this large property only after other buyers appeared August 27 and October 13, 1987, etc. with multimillion dollar written offers for the entire partnership property. These were promptly submitted to Respondent Lyden and his counsel and doubtless influenced them in bringing this proceeding.

6. When a Town upzones land from quarter-acre to 4-acres, as here, and charges sub-division fees of $5,000 per lot, in advance, and takes four years, more or less, to clear a subdivision application as does the Town of Lewisboro, the rights of property owners are violated under Article XIV of the United States Constitution and the several Civil Rights Acts, as amended.

7. The function of our national Government and this Supreme Court is to enable this country to function as a unit. When local units undertake to block or even excessively increase the cost of housing development, limitations should be placed on such strictures. That is what is respectfully requested here. No home requires four acres or even two acres of land. Anyone who wants such a home may have it. But he should not require his neighbor to do likewise. The days of four acre zoning,- and even two acre zoning are past. The children of such families should be permitted to have houses closer to home. Two and four acre zones are excessive and an invalid exercise of local police power.

8. Present day "zoning" is relatively new in the law. It grew out of the somewhat surprising U.S. Supreme Court decision approving zoning"in principle" in Euclid, .. Ohio, which wanted to keep "industry" out of a particular area of the village. (Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)). Since "Euclid", the control of neighboring land has become a penchant and/or privilege of many people who seek to regulate what other people do or do not do with their property. The sole authority and control for such activity rests on the constitutional "police power" of government. "Police Power" is Constitutionally limited to matters pertaining to "health", or "morals", or "safety" i.e. principally "sanitation", and "proper conduct", and "due care". Such are commonly embraced within the term "general welfare".

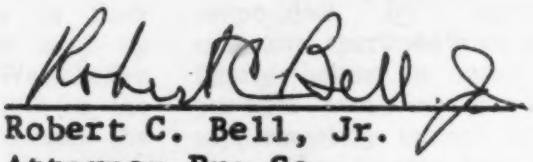
We have no quarrel with the "Euclid" v case or its progeny. We only want to build needed housing, which is the only thing that this particular real estate is good for. This has not been easy. This case is not unlike the cases involved in Mount Laurel Township v. Public Advocate of N.J. (53 N.J. 522, 416 Atl.2d 886)(1980), where development efforts were repeatedly blocked by local strictures, where such, as here, had no relevance to health, or morals, or safety (and were often contra the general welfare). The Mount Laurel case should be implemented in a manner which will permit it to function as obviously intended. A one acre ceiling on household zoning could and should give a reasonable limited and timely answer and should resolve most of the more serious problems involved in current zoning questions.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: August 14, 1990
New Canaan, Connecticut 16840

Respectfully submitted,



Robert C. Bell, Jr.
Attorney Pro Se
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THE LEDGER

Wednesday, January 8, 1986
Telephone 763-8821 or 438-6544

Affordable Housing

New York City: it's where the salaries are.

It stands to reason that the people making those salaries are going to want to live within a reasonable distance to their workplace. So they snap up homes in northern Westchester for $200,000-$250,000 (on the average) and they become the commuters that make up a healthy chunk of this area's residents.

And, if the times happen to be reasonably prosperous, as they are now, and the metropolis grows, there'll be more of a demand for housing. What's already there will go up in price, and new homes will come on the market at prices that will raise eyebrows even by today's standards.

Combine that with the spillover of big business into the suburbs (such as the IBM's and the PepsiCo's into towns like Somers), and it doesn't take a person with an MBA to understand where the housing prices are going to go.

Through the roof.

It's been a problem in northern Westchester for years already, but now the numbers

Our local town officials are not the blame for the situation, but they are left with the chore of finding solutions to it.

Lewisboro and Bedford have responded by legalizing assessory apartments in single-family homes, a move that provides homeowners with a supplementary income to help them afford to stay here, while at the same time providing renters an affordable option.

Pound Ridge Supervisor Peter Robohm says an accessory apartments law is going to be considered in that town this year.

That's a move in the right direction, although even that can only have a modest effect.

Bedford has adopted a floating senior citizen housing zone that addresses the problem for the elderly population, to some degree.

What else can be done? Are the towns willing to use zoning to give middle income families in general a chance? That's a tough question, since it balances against the towns' desire to protect the environment.

HOMER CUMMINGS
WILLIAM STANLEY 1881-1940
MAX OSCAR TRUITT
J. EDWARD BURROUGHS, JR.
WILLIAM B. DONNELLY
JOHN W. CROSS
ALBERT L. REEVES, JR.

CARY HUN ZUWER
ALFRED E. NOTARIANNI
RICHARD A. FITZGERALD
GEORGE C. PENDLETON
JOHN C. HARTENDORN
ELDON H. CROWELL

CUMMINGS, STANLEY, TRUITT & CROSS
COMMONWEALTH BUILDING
1625 K STREET, NORTHWEST
WASHINGTON 6, D.C.

TELEPHONE
DISTRICT 0777

CABLE ADDRESS
"CUMTRU" WASHINGTON

August 20, 1952

TO WHOM IT MAY CONCERN

This is to certify that I am acquainted with Robert C. Bell, Jr., who resides on South Main Street, New Canaan, Connecticut. He is presently practicing law with the firm of Cummings & Lockwood at Number One Atlantic Street, Stamford, Connecticut.

I have known Mr. Bell a good many years. I also knew his father, Judge Robert C. Bell, presently United States District Judge residing in St. Paul, Minnesota. Mr. Robert C. Bell, Jr., received an A.B. degree in 1933 from the University of Minnesota and the degree of LL.B. in 1936 from the Harvard Law School. He has had experience in a wide range of subjects. He was employed in the Lands Division of the Department of Justice at St. Paul, Minnesota, in connection with important condemnation work. He is experienced in corporation and tax law. He has also had experience in the United States Department of Labor in the Wage & Hour Division. In addition to this, he was an attorney with the National Defense Advisory Commission under Wm. S. Knudsen, and as time went on handled matters of constantly increasing importance. He was in the United States Army from January 1944 to December 1945 and was later connected with the Judge Advocate General's Division and was also legal officer in the Army Medical Purchasing Office and for about six months was a member of the War Department Board of Contract Appeals in the Office of Under-Secretary of War Robert Patterson. He was also connected with the War Production Board as Senior Attorney and was a special assistant to Honorable John Lord O'Brian.

I have had contact with Mr. Bell in various ways and at various times. His present age is about 40 years. It is my estimate of him that he is a man of unusual legal attainments and is eminently well qualified to take charge of any legal matters that may be entrusted to him. So far as his character, industry, integrity and loyalty are concerned, no one could stand higher. I have every confidence in him, and it gives me satisfaction to recommend him without reservation.

Homer Cummings

2A

WHO'S WHO IN THE WORLD

BELL, ROBERT COLLINS, lawyer; b. St. Joseph, Mo., Sept. 19, 1912; s. Robert Cook and Mamie Burke (Collins) B.; m. Mary Katherine Morris, Mar. 22, 1941; children—Robert III, Marianne. Student Carleton Coll., 1929-32; A.B., U. Minn., 1933; J.D., Harvard U., 1936. Bar: Minn. 1936, Conn. 1942, D.C. 1949, N.Y. 1953. Assoc. Fowler, Youngquist, Furber, Taney and Johnson, Mpls., 1936-37; atty. U.S. Wage and Hour Div.-Minn., N.D., S.D., Mont., 1939-40, War Prodn. Bd., 1940-42; assoc. Cummings and Lockwood, Stamford, Conn., 1942-52; ptnr. Smith Mathews, Bell and Solomon, N.Y.C., 1952-62; sole practice, New Canaan, Conn., 1962—; pros. atty., New Canaan, 1948-50. Mem. War Dept. Bd. Contract Appeals, Office of Under Sec. of War, 1944-45. Mem. ABA, Conn. Bar Assn., Internat. Bar Assn. Democrat. Congregationalist. Clubs: Harvard (N.Y.C.); Tokeneke (Darien, Conn.); Masons. Obtained judgements totalling over 25 million dollars on behalf of the Potawatomi, Miami and Chippewa Indian Tribes in U.S. Ct. Claims and U.S. Indian Claims Commn. Home: 528 Main St, New Canaan, CT 06840 Office: 528 Main St, New Canaan, CT 06840

BELL, MARY-KATHERINE, lawyer; b. Los Angeles, July 7, 1910; d. Weldon Branch and Vina (Cowan) Morris; m. Robert Collins Bell, Mar. 22, 1941; children—Robert Collins III, Marianne Bell Reifenheiser. B.A., Stanford U., 1934; J.D., George Washington U., 1943. Bar: D.C. 1943, N.Y. 1952, Conn. 1960. Atty., Cummings & Lockwood, Stamford, Conn., 1944-45, Shearman & Sterling, N.Y.C., 1948-77, Ivey, Barnum & O'Mara, Greenwich, Conn., 1978-83; asst. sec. to Assn. Bar City of N.Y., 1946-47; atty. to Conf. on Personal Fin. Law, N.Y.C., 1947-48; sole practice, New Canaan, Conn., 1983-84; mem. Tax Adv. Com. of Am. Law Inst. Co-editor: U.S. Bankruptcy Guide, 1948. Mem. Democratic Town Com. Mem. Conn. Bar Assn., Delta Gamma. Clubs: Cosmopolitan (N.Y.C.), Tokeneke (Darien). Home: 528 Main St New Canaan CT 06840 Died May 24, 1984

AFFIDAVIT OF SERVICE

STATE OF CONNECTICUT)
) ss.: NEW CANAAN
COUNTY OF FAIRFIELD)

PETER D. WEST being duly sworn, deposes and says he is over the age of 18 and is not a party in this action; that on the 13th day of August, 1990, the deponent served three copies of the annexed Reply Brief in the following manner:

By mailing the same in a sealed envelope with postage prepaid there, in a post-office of the United States Postal Service within the State of Connecticut, located 2 Pine Street, New Canaan, Connecticut, addressed to the last known address of the addressee as indicated below:

TO: James G. Sweeney, Esq.
Attorney for Respondent
Shamberg Marwell Cherneff
Hocherman & Davis, P.C.
55 Smith Avenue
Mount Kisco, New York 10549
(914) 666-5600

PETER D. WEST

Sworn to before me this
18th day of August, 1990.

STEPHEN J. KARL

Notary Public

STEPHEN J. KARL